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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA and
STATE OF CALIFORNIA, ex. rel.
BRENT BAILEY AND EMILY WADE, ,

Plaintiffs/Relators,

v.

GATAN, INC, et al.,

Defendants.

No. 2:12-cv-106 MCE CKD

ORDER

Defendants’ motion for sanctions came on regularly for hearing on August 17, 2016. Daniel Bartley appeared for plaintiffs/relators. Matthew Kahn and Deena Klaber appeared for defendants. Upon review of the documents in support and opposition, upon review of documents submitted in camera, upon hearing the arguments of counsel, and good cause appearing therefor, THE COURT FINDS AS FOLLOWS:

In this qui tam action, plaintiffs/relators allege claims under the federal and California False Claims Acts arising out of defendants’ manufacture and selling of cameras and other accessories used with electron microscopes. Relators claim the products were defective because they allegedly leak harmful X-ray radiation.

A protective order was entered on October 26, 2015. ECF No. 79. That order, in pertinent part, defines “Confidential” information as “information (regardless of how it is

1 generated, stored or maintained) or tangible things that qualify for protection under Federal Rule
2 of Civil Procedure 26(c), as well as confidential or sensitive proprietary, business, commercial or
3 personal information.” ECF No. 79, ¶ 2.2. “Attorneys Eyes Only” is defined as “extremely
4 sensitive ‘Confidential Information or Items,’ disclosure of which to another Party or Non-Party
5 would create a substantial risk of serious harm.” ECF No. 79, ¶ 2.7. Under the recitation of
6 particularized need for protection and need for a court order, the parties recite that “this action is
7 likely to require production of confidential, highly confidential, and proprietary information of
8 Gatan, its parent corporation, Roper Technologies, Inc. (“Roper”), and Gatan’s customers and
9 competitors, the disclosure or use of which could cause severe and irreparable damage to the
10 business of the Producing Party. This includes invoices, price information, pricing strategies,
11 budgets and other financial records, customer identities, customer lists, documents reflecting
12 business strategies, audits, internal policies and procedures, information related to the design or
13 development of products, proprietary technology related to products, internal compliance
14 materials, private contracts, sales and profit information, and payroll or compensation
15 information.” ECF No. 79, ¶ 3.

16 Defendants contend that the relators violated the protective order by reviewing documents
17 designated “Attorneys Eyes Only” and by divulging the content of documents designated
18 “Confidential” and “Attorney Eyes Only” to customers of Gatan. Defendants further contend that
19 relators violated the protective order by using protected material for purposes other than this
20 litigation.

21 The court has thoroughly reviewed the depositions of relators as well as all declarations
22 and documents submitted in connection with the pending motion. Upon this review, the court
23 finds that relators have violated the protective order by reviewing documents properly designated
24 “Attorney Eyes Only” and that plaintiffs’ counsel is culpable in this violation. In addition, while
25 arguably it would not have been a violation of the protective order to simply inquire of Gatan’s
26 customers whether they had received a letter of disclaimer, relators here did more. Relators claim
27 that they did not specifically share the contents of protected documents with Gatan customers;
28 however, review of their deposition transcripts demonstrate that relators “warned” the customers

1 based on what they thought the protected documents showed. In addition, it is readily evident
2 that relators used information from documents designated as “Confidential” or “Attorneys Eyes
3 Only” for purposes other than this litigation. Relators have admitted that they discovered from
4 protected documents the names of institutions to which Gatan products had been sold and used
5 that general information to contact specific individuals to warn them about alleged X-ray leakage.
6 Such conduct violated the protective order. ECF No. 79, ¶ 8.1 (protected material may be used
7 only for prosecuting, defending, or attempting to settle this litigation); ¶ 8.2 (disclosure of
8 “confidential” information may not be made to third parties); ¶ 8.3 (disclosure to plaintiffs of
9 documents designated “Attorneys Eyes Only” is barred).

10 Turning to the question of the appropriate sanction for violation of the protective order,
11 the court recognizes the difficulties encountered by plaintiffs/relators and their counsel in
12 processing a significant document production made near the end of discovery and that the
13 documents were produced as they were maintained in the ordinary course of business, causing
14 approximately 30 documents designated as “Attorneys Eyes Only” to be scattered among 5,000
15 documents. The court also recognizes that plaintiffs/relators believe (whether justified or not)
16 that the protected documents raise serious concerns regarding public health. However,
17 plaintiffs/relators do not have the right to engage in blatant violations of the protective order. The
18 court will therefore direct payment of reasonable expenses incurred in connection with the motion
19 of \$5,000 under Federal Rule of Civil Procedure 37(b)(2)(C). Considering all the circumstances
20 of this case, the court finds that an award greater than that amount would be unjust.

21 In addition, while cognizant of prior restraint issues, the court will bar plaintiffs/relators
22 from communicating with Gatan’s customers regarding X-ray radiation emissions from
23 configurations of electron microscopes and Gatan products. While plaintiffs/relators claim that
24 much of the information which led to their contacts with Gatan customers is publicly available, it
25 is clear that the thread leading to those contacts trails back to protected documents produced by
26 defendants. The court concludes that the only way to compel compliance with the court’s
27 protective order is by barring plaintiffs/relators from engaging in certain communications.
28 Defendants’ request to also bar plaintiffs’ counsel, however, sweeps with too broad a broom and

1 would create unwarranted impediment to prosecution of the matter. The court will reserve
2 decision on whether to issue the evidentiary sanctions sought by defendants pending further
3 briefing from defendants as to the precise nature of the alleged harm caused by relators'
4 conversations with the customers contacted by relators.

5 Accordingly, IT IS HEREBY ORDERED that:

6 1. Defendants' motion for sanctions (ECF No. 105) is granted in part.

7 A. Reasonable expenses in the amount of \$5,000 are awarded to defendants
8 against plaintiffs/relators Brent Bailey and Emily Wade, and their counsel Daniel Bartley, jointly
9 and severally;

10 B. Until conclusion of this litigation, absent further order from the Court,
11 plaintiffs/relators Brent Bailey and Emily Wade are prohibited from having communications with
12 any of defendants' customers regarding X-ray radiation emissions from configurations of electron
13 microscopes and Gatan products.

14 C. Within fourteen days, defendants shall submit further briefing with regard to
15 the alleged harm caused by plaintiffs/relators' conversations with the customers contacted by
16 plaintiffs/relators. Plaintiffs/relators shall file further briefing on the issue within fourteen days
17 after defendants' briefing is filed. Defendants may file a reply within seven days of
18 plaintiff/relators' briefing. The matter shall thereafter stand submitted.

19 D. The court declines to enter issue sanctions with respect to recovery of money
20 damages.

21 2. Plaintiffs/relators are cautioned that further violation of the protective order may result
22 in evidentiary sanctions and/or the recommendation that the action be dismissed.

23 3. Plaintiffs/relators' counsel is directed to serve a copy of this order on plaintiffs/relators.

24 4. Plaintiffs/relators' motions to file under seal the deposition transcripts of Brent Bailey
25 and Emily Wade (ECF No. 129) and to file under seal plaintiff/relator Emily Wade's August 17,
26 2016 declaration (ECF No. 132) are granted.

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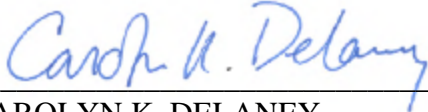
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5. The Clerk of Court is directed to seal plaintiffs/relators' opposition (ECF No. 115). Defendants shall file a redacted version of plaintiffs/relators' opposition within five days of the date of this order.

6. With respect to any further documents produced in this action, any documents designated "Confidential" or "Attorneys Eyes Only" shall be segregated in the production from documents that are not so designated.

Dated: August 22, 2016



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

4 bailey106.oah.sanc